STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	)	
	)	
Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act	)	Docket No. 01-0614

SBC ILLINOIS' REPLY COMMENTS ON REMAND

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INTRODUCTION

The principal issue on remand relates to the scope of unbundled access. The Supreme Court squarely addressed that question – and the scope of state authority to regulate local competition in the wake of the federal Telecommunications Act of 1996 – in *AT&T Corp. v. Iowa Utilities Bd*., 525 U.S. 366 (1999). Turning first to the scope of state authority, the Court admonished that "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the states." *Id*. at 378 n.6. The Court found "no doubt" that states were no longer free "to do their own thing," and dismissed the idea of "a federal program administered by 50 independent state agencies" without federal limits as "surpassing strange." *Id*.

One of the fundamental "matters addressed by the 1996 Act" is "*which* network elements must be made available" on an unbundled basis. *Id*. at 391-92. Among other things, section 251(d)(2) mandates that unbundled access can be required only where its absence would "impair" requesting carriers. 47 U.S.C. § 251(d)(2). The Supreme Court repudiated the theory that incumbents could be forced to provide "blanket access" to their networks, holding that "the Act requires the FCC to apply some *limiting* standard." *AT&T Corp*., 525 U.S. at 387 (emphasis added). As the Court reasoned, if "Congress had wanted to give blanket access to incumbents' networks," it "would not have included § 251(d)(2) in the statute at all. It would simply have said * * * that whatever requested element can be provided must be provided." *Id*. at 390.

Two years after the Supreme Court's emphatic holding, the Illinois legislature added section 13-801 to the state's Public Utilities Act. 220 ILCS 5/13-801. The question before this Commission is whether, in enacting section 13-801, the General Assembly flouted the will of Congress and the holding of the Supreme Court, by "doing its own thing" and requiring SBC Illinois to provide the very "blanket access" that Congress and the Court had renounced.

In its June 11, 2002 initial Order in this docket, the Commission construed section 13-801(d)(4) to do just that, ordering SBC Illinois to provide certain "network elements platform[s]" without regard to the federal "impairment" standard. The Order recognized that subsections (d)(1) and (d)(3) reference "unbundled" network elements (references the Order correctly deemed to *incorporate* federal law) but noted that subsection (d)(4) left out the word "unbundled." That single absence led the Order to deem that the Illinois Act had relegated federal law, and the limiting standard of impairment, "to the scrap heap of time." *Id*. ¶ 75. Under that interpretation, to take one example, SBC Illinois would have to provide CLECs with existing "platforms" that include enterprise switching, even though the FCC has squarely held that CLECs are perfectly capable of serving enterprise customers by investing in their own facilities, and even though unbundled access would discourage such investment.

SBC Illinois sought judicial review of the initial Order and filed its opening brief in the federal district court. Rather than attempting to defend the Order, the Commission urged the court to remand so it could reconsider its construction and fulfill its "obligation to ensure that its actions comport with federal law." Attach. B (ICC Reply Br. in Support of Remand) at 4. By then, the FCC had issued its *Triennial Review Order* ("*TRO*"), in which it applied the Act's limiting standard and held that incumbents could not be required to unbundle several network elements.[1] The *TRO* also declared that states could *not* "impose any unbundling framework they deem proper under state law, *without regard to the federal regime*" and directed them to "alter their decisions to conform to our rules." *TRO* ¶¶ 192, 195 (emphasis added).

[1] The FCC also attempted to revive its "blanket access" regime for three network elements: "mass market" switching, "enterprise market" loops, and dedicated transport. The D.C. Circuit vacated those unbundling requirements, and the FCC is now developing new rules for those network elements. The ALJ here stayed further proceedings on those issues pending the issuance of the FCC's new rules.

This Commission told the federal court that it heard the FCC's message, noting that the *TRO* "limited state commissions' ability to impose unbundling requirements that exceed the federal unbundling requirements under both delegated federal authority and independent state law" and "directed states to review their existing state requirements and conform those rules and decisions to the FCC's new rules." Attach. A (ICC Mem.) at 5. The Commission assured the court that it would "reopen[] Docket No. 01-0614" and "if necessary, modify the Order to comport with the FCC's new rules." Attach. B at 4. The Commission advised that remand might "lead to a different interpretation and application of Section 13-801, which may, in turn, impact some or all of SBC's claims before this Court." *Id.* at 6. The court granted the Commission's request, stating that "the ICC is empowered to (1) reconstrue the requirements of section 13-801, (2) revisit and resolve any ambiguities in statutory language, and (3) reconsider its application of the statute's requirements." Attach. C (court order) at 1.

As SBC Illinois showed in its opening comments, implementation of the Commission's representations and the court's remand order *would* "lead to a different interpretation and application of Section 13-801," a reading that would "comport with federal law" rather than nullifying it as the initial Order did. As the Commission recently recognized in its Order on Reopening in the *Project Pronto* case, Docket No. 00-0393, it has an affirmative "duty to construe acts of the legislature so as to affirm their constitutionality and validity" (*Continental Illinois Nat'l Bank & Trust v. Illinois State Toll Highway Comm'n*, 42 Ill. 2d 385, 389 (1969)) and a corresponding obligation to "avoid a construction which would raise doubts as to [the statute's] validity." *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 363 (1986). In the Commission's words, because the Commission must be "attentive[] to the supremacy clause of the U.S. Constitution and the fundamental precept that where state law and federal clash, the

conflict is resolved in favor of federal law," it must "decline to purposefully invite preemption." *Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service*, Docket No. 00-0393, Final Order on Reopening, at 49 (ICC Sept. 28, 2004) ("Sept. 28, 2004 Order on Reopening"). That same principle applies to the Commission's order on reopening in this docket: the Commission must reject the CLECs' and Staff's invitation to nullification and "thus steer clear of the 'path of preemption'" (*id.*) by construing section 13-801 in a manner that conforms to federal law.

Section 13-801 *can* reasonably be interpreted in a constitutional manner. Indeed, with respect to the fundamental question here – which network elements are to be unbundled – the statutory language *tracks* federal law. Subsections 13-801(d)(1), (2), and (3) mirror FCC Rules 315(a), (b), and (c). SBC Br. 38. Moreover, subsections (d)(1) and (3) state that the combinations that incumbents must "provide" and/or "combine" are to consist entirely of "unbundled" network elements. *Id*. at 39. Section 13-801(d)(4) cannot be construed in isolation, as the initial Order erroneously attempted, but instead must "be construed with every other part or section so as to produce a harmonious whole." *Sulser v. Country Mut. Ins. Co.*, 147 Ill. 2d 548, 555 (1992). Thus, a section 13-801(d)(4) "platform" should be read as being coextensive with – not in conflict with – the existing combinations of "unbundled" network elements that an incumbent carrier must provide pursuant to subsections 13-801(d)(1)-(3) and the federal rules that those subsections track. A reasonable construction? Eminently – as demonstrated by the fact that the Commission reached the same result on its *first* reading of section 13-801 in the Part 790 rulemaking, prior to taking the opposite course in the June 11, 2002 Order here. Section II *infra*.

Staff and the CLECs understand full well that *faithful* adherence to the remand order, to the Commission's representations to the federal court, and to the Commission's obligations to construe the statute consistently with federal law, would lead the Commission to change its initial Order. Thus, they openly ask the Commission to take a *faithless* course: to shirk its responsibilities, renege on its commitments, and turn the remand into a revolving door that accomplishes little more than a repeat of the unlawful initial Order and a return to federal court.

It is not surprising that the CLECs would advocate such nullification, given their naked self-interest in stringing out a "blanket access" regime and putting off any ruling on its illegality. Thus, the Commission should be neither surprised – nor moved – by the CLEC *non sequitur* that SBC Illinois' comments are "directly contrary to the Commission's July 11, 2002 Order" and "tantamount to an untimely petition for rehearing." CLEC Br. 2, 54. The CLECs are forgetting that, by asking the federal court to give the Commission an opportunity to reconsider its initial Order, the Commission has, in effect, *granted* rehearing of the initial Order. The Commission's task now is to reconsider that Order, not simply to rubber-stamp it.

But it is surprising to see Staff – which knows full well the Commission's responsibilities to the courts and to the law – join the CLEC nullification approach. Staff contends the initial Order "got it right the first time" and that "the proper course of conduct for SBC is to make its challenge * * * on the record to preserve the issue for appeal." Staff Br. 14, 17. But SBC Illinois *already* preserved its objections the first time around; indeed, SBC Illinois *already filed and began briefing* its action for judicial review. By now, that action would have been fully briefed and would likely have been decided. The only reason we are here now is that the Commission's lawyers asked for and got a second chance to fulfill its "obligation to ensure that its actions comport with federal law" – an obligation Staff and the CLECs now disclaim. Staff

goes so far as to contend that the very provisions of the *TRO* that the Commission cited *as the basis for remand* are inapplicable, asserting (at 19) that "the *TRO*'s statement that the states 'amend their rules and * * * alter their decisions to conform to our rules' has no legal effect." Had that been the Commission's position, it would not have asked for a remand in the first place. It would simply have taken its chances in federal court – where it will surely return if it adopts Staff's position, this time with the unenviable duty of explaining to the court why, after asking for a remand and promising to consider the *TRO*, it decided to disregard the FCC's instructions.

But even though Staff and the CLECs purport to *defend* the initial Order and oppose reconsideration, neither one of them defends the Order's rationale: that the presence of the word "unbundled" in subsections 13-801(d)(1) and (d)(3) incorporates the federal impairment standard, while the absence of that word in subsection (d)(4) simultaneously nullifies that standard. In fact, Staff attacks the Order's theory, contending that "the use of the term 'unbundled network elements' in Section 13-801(d)(3) is * * * not dispositive" (which would of course mean that the absence of the term in subsection (d)(4) is *also* not dispositive). Staff's new theory is that the legislature constructed an elaborate fiction, under which the Commission would order blanket access even where unbundling has been rejected by federal law – and even beyond the section 13-801(d)(4) "platform" context addressed in the Order – simply by slapping a new price tag on top. Under Staff's view, a formalistic price change of even a sliver of a penny – or even a reduction in price below the already low federal rates – would allow the Commission to achieve the same substantive result that federal law precludes. Here again, the course Staff urges is not compliance with federal law and the Commission's obligations on remand, but evasion. The *TRO* directs states to "amend their rules and * * * alter their decisions to conform to" the FCC's national rules – not to relabel their decisions to evade the FCC's rules. *TRO* ¶ 195. And

in light of the *TRO* the Commission represented to the federal court that it would reconsider its construction of section 13-801(d)(4) – not invent fictions to disguise that construction. More fundamentally, there is no toehold for Staff's theory in the statutory language. Staff simply invented its pricing fiction after the fact. Section I.B *infra*.

The CLECs, meanwhile, devote much of their brief to a straw man, arguing that the initial Order is not preempted by federal law – an argument they themselves say is not properly before the Commission, and that is also erroneous on its own terms. Section I.A *infra*. When it comes to the real issue of statutory interpretation, the CLECs do not attempt any serious rebuttal to SBC Illinois' analysis, and offer no real analysis of their own. First, they contend that the legislature intended to go beyond federal law *somewhere* in section 13-801, and that the Commission would nullify the entire statute if it construed the scope of unbundling here to be consistent with federal law. Nonsense. This proceeding deals only with a few subsections of section 13-801, not the entire statute. The bulk of section 13-801 addresses topics (such as performance standards) *other* than the core question at issue here: which network elements must be unbundled. On that issue, section 13-801(d)(1)-(d)(4) should be construed consistently with federal law because the statutory language *tracks* federal law and because the Commission is duty-bound to construe the statute consistently with federal law wherever possible.

Equally absurd is the CLEC theory that SBC Illinois, by submitting to alternative regulation in 1994, somehow agreed in advance to the additional unbundling requirements imposed by the initial Order in 2002. Plainly, SBC Illinois did not agree to any and all future rules that the Commission might apply to alternative regulation carriers. And SBC Illinois certainly did not waive its right to challenge orders that are contrary to federal law or that rest on an erroneous interpretation of state statutes (as the initial Order here did). No such "agreement"

appears in the alternative regulation statute or in SBC Illinois' alternative regulation plan. Nor could it: SBC Illinois became subject to alternative regulation in 1994, while the state statute that the Commission is to construe here was enacted in 2001, and the federal law that the Commission is to consider here – the 1996 Act – was enacted in, well, 1996. As the Illinois Appellate Court recently confirmed, "[n]othing in the [Public Utilities] Act, *even the independent authority for alternative regulation* found in section 13-506.1, gives the Commission the power to controvert federal law." *Illinois Bell Tel. Co. v. ICC*, Nos. 3-03-0207 & 3-03-0515, 2004 WL 2093617, at *5 (Ill. App. Sept. 17, 2004) (emphasis added). Section III *infra*.

DISCUSSION

In Section I below, SBC Illinois demonstrates that, in light of the serious constitutional questions identified in SBC Illinois' Initial Comments arising out of the clash between federal law and the Commission's prior construction of section 13-801(d), the Commission has both the power and the duty to consider alternative constructions that would avoid the need to resolve those questions. SBC Illinois further shows in Section I that (i) the suggestion that SBC Illinois is asking the Commission to preempt a state statute is a red herring, (ii) the CLECs' anti-preemption arguments are entirely wrong, (iii) Staff's formalistic pricing theory is invented from whole cloth, and (iv) the contention by both the CLECs and Staff that the national unbundling determinations in the *TRO* lack preemptive force absent a declaratory ruling to that effect by the FCC is contrary to settled law.

SBC Illinois then shows in Section II.A that its proposed construction of section 13-801(d) is faithful to the text and structure of the General Assembly's scheme for providing access to elements of SBC Illinois' network, viewed as a whole, and results in a coherent and internally consistent set of obligations. In view of that sensible interpretation, it would violate fundamental canons of construction to reaffirm the Commission's prior view that the General

Assembly intended to flout federal law. In Section II.B, SBC Illinois applies its proposed construction to the specific network elements at issue in this proceeding.

In Section III, SBC Illinois rebuts the CLECs' contention that the Illinois Alternative Regulation statute permits the Commission to ignore federal and state law. In Section IV, SBC Illinois addresses the CLECs' erroneous arguments regarding specific holdings of the *TRO*. Section IV also addresses the CLECs' unfounded procedural theory that the Commission should renege on its promise to consider "all of SBC's claims" before the district court and restrict its review to the *TRO*, without considering whether its Order comports with other principles of federal law. In Section V, SBC Illinois discusses revisions to the Commission's prior Order on the subject of collocation. And, finally, in Section VI, SBC Illinois demonstrates why the Commission should, consistent with its recent decision in Docket No. 00-0393, permit SBC Illinois to withdraw the tariffs that it filed pursuant to the Commission's prior Order.

I. THE COMMISSION HAS A DUTY TO AVOID IF POSSIBLE THE SERIOUS CONSTITUTIONAL QUESTIONS PRESENTED BY THE CLASH BETWEEN FEDERAL LAW AND THE COMMISSION'S PRIOR CONSTRUCTION OF SECTION 13-801.

The CLECs devote an entire section of their Response to the proposition that "[t]he Commission is without the authority to preempt or find unconstitutional section 13-801." CLEC Br. 12-16. This argument is a straw man. In its Initial Comments, SBC Illinois acknowledged that "the Commission may not invalidate a statute on constitutional grounds." SBC Br. 31.

However, the fact that the Commission cannot preempt state law in no way renders preemption analysis irrelevant to this proceeding. As SBC Illinois has demonstrated, the clash between federal law as expressed in the 1996 Act and implementing FCC regulations and state law as construed in the Commission's prior Order in this docket places squarely at the center of this proceeding the rule that "a statute will be interpreted so as to avoid a construction which

would raise doubts as to its validity." *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 363 (1986). At a minimum, SBC Illinois has raised grave constitutional questions with respect to several aspects of the Commission's prior Order implementing section 13-801. Staff has even acknowledged the tension between state and federal law in several instances. See, *e.g.*, Staff Br. 4, 38, 41.

Yet both Staff and the CLECs refuse to engage in a serious effort to assist the Commission in its duty to forge a narrowing construction if at all possible. As SBC Illinois explained in its Initial Comments (at 29-44) and reiterates here (see Section II *infra*), such a construction is readily available. But before addressing the question of statutory construction, it is necessary to refute the CLECs' contention that, notwithstanding the Supreme Court's and the federal courts of appeals' emphasis on the limits of incumbent carriers' unbundling obligations and the FCC's ongoing efforts to give meaning to those limits, the states retain an entirely free hand to impose under independent state authority whatever unbundling requirements they deem appropriate. As explained below, the CLECs could not be more mistaken in their assessment of the scope of state unbundling authority under the 1996 Act.

A. The CLECs' Arguments Regarding The Scope Of State Unbundling Authority Are Incorrect.

The CLECs' arguments essentially write Congress and the FCC out of the regulatory process under the "new *federal* regime" established in the 1996 Act. *AT&T Corp.*, 525 U.S. at 379 n.6. According to the CLECs, states are free to disregard federal limitations on unbundling. CLEC Br. 20-21. In fact, the CLECs go so far as to suggest that the 1996 Act authorizes states to undertake "whatever measures" they deem necessary to assist competing carriers "'short of confiscating incumbents' property.'" *Id*. at 21.

In support of these outlandish contentions, the CLECs principally rely on the Act's so-called "savings clauses," which the CLECs lawlessly read to permit the states to require that ILECs *do* precisely what Congress, the federal courts, and the FCC have said ILECs must *not* be required to do. See CLEC Br. 20-23. The CLECs' argument rests on a stubborn refusal to recognize the sea change in federal control of local telecommunications competition under the 1996 Act, a willful disregard of the specific pronouncements of the federal courts (including the Seventh Circuit) and the FCC on the scope of federal control over the unbundling of network elements, and a flawed reading of the Act's savings clauses. Time and again, the CLECs completely ignore the provisions of the 1996 Act and the FCC's implementing regulations that thoroughly debunk the CLEC notion that the Act does nothing more than make unbundling "recommendations" that states can evade or reject at their pleasure. Among other things, the CLECs fail to address (i) the limitations on state authority *in the 1996 Act* itself, (ii) the Supreme Court's construction of the scope of federal preemption *under the 1996 Act*, (iii) the FCC's own statements about the preemptive force of the rules that it promulgated to carry out Congress' express statutory commands *under the 1996 Act*, and (iv) the Seventh Circuit's analysis of the scope of preemption under the 1996 Act *in the specific context of unbundling* in *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 394-95 (7th Cir. 2004). The cumulative effect of the CLECs' exercise in evading the critical authorities is devastating to their position. As the controlling authorities cited below conclusively demonstrate, the CLECs' theory that the states are free to nullify Congress' unbundling determinations is wholly without merit.

1. As To "Matters Addressed" In The 1996 Act – Including Unbundling – State Regulation Must Be Consistent With the FCC's Rules.

As Justice Scalia's opinion for the Court in *AT&T Corp.* explained, Congress "unquestionably" took "regulation of local telecommunications competition away from the

States" as to all "matters addressed by the 1996 Act." 525 U.S. at 379 n.6. The Seventh Circuit likewise has stated that the 1996 Act "did take over some aspects of the telecommunications industry" and "precluded all other regulation except on its terms." *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 342-43 (7th Cir. 2000). And the Seventh Circuit has held in a preemption case under the 1996 Act that "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law." *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003).

The unbundling of network elements plainly is one of the most significant "matters addressed by the 1996 Act." *AT&T Corp.*, 525 U.S. at 379 n.6. In section 251(d)(2) of the Act, Congress specifically "charged the [FCC] with identifying" which network elements are to be unbundled. *USTA v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) (*"USTA I"*). The Supreme Court flatly rejected the FCC's initial attempt to set unbundling rules, holding that a rule giving "blanket access" to incumbents' networks was not faithful to the plain terms of the 1996 Act. *AT&T Corp.*, 525 U.S. at 387-90. The Supreme Court sent the FCC back to the drawing table, explaining that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act." *Id*. at 388; see also *id*. at 391-92 (noting that the Act "requires the [FCC] to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements").

Since *AT&T Corp.*, the D.C. Circuit has explained that a lawful "impairment" standard could not reflect an "open-ended" judgment that "more unbundling is better." *USTA I*, 290 F.3d at 422. Instead, it must result from a "nuanced" approach to unbundling that "balance[s]" the

"competing concerns" of promoting network investment and innovation on the one hand and avoiding wasteful and inefficient duplication of facilities on the other hand. *Id*. at 427. The FCC subsequently explained in the *TRO* that states may not simply "impose any unbundling framework they deem proper under state law, without regard to the federal regime." *Id*. ¶ 192. To the contrary, both the Act itself and "long-standing federal preemption principles" place significant restrictions on state authority. *Id*. In particular, a state's authority "is limited to state unbundling actions that are consistent with the requirements of section 251 and do not 'substantially prevent' the implementation of the federal regulatory regime." *Id*. ¶ 193. And because the Act expressly confers on the FCC power to prescribe "regulations to implement the requirements" of section 251 and requires state commissions to resolve interconnection disputes in accordance with "the requirements of section 251, *including the regulations prescribed by the [FCC] pursuant to section 251*" (47 U.S.C. § 252(c)(1) (emphasis added)), there can be no doubt that FCC regulations are "requirements of section 251." *TRO* ¶¶ 192-93 & n.614. The FCC added that if a state commission were to "require the unbundling of a network element for which the [FCC] has * * * found no impairment," such a requirement "would conflict with the limits set in section 251(d)(2)." *Id*. ¶ 195.

In its D.C. Circuit brief in the *TRO* appeal, the FCC was even more explicit as to the preemptive effects of its unbundling rules. As the FCC wrote, "[i]n the UNE context * * * a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element," and "*[a]ny state rule that struck a different balance would conflict with federal law, thereby warranting preemption*." Brief for Respondents FCC and United States in No. 00-1012 and Consolidated Cases at 92-93 (D.C. Cir. Dec. 31, 2003) (Attach. D hereto) (emphasis added).

Thus, at least as to UNEs, the FCC's rules establish a line – *i.e.*, both federal floor and a federal ceiling – from which states may not deviate. *AT&T Corp.*, 525 U.S. at 379 n.6 (holding that states must "hew" to the lines drawn by Congress and the FCC with respect to the "matters addressed" in the 1996 Act).

Because unbundling plainly is one of the "matters addressed" by Congress, any retained or residual state authority must be exercised in a manner consistent with Congress' express objective that the FCC – and it alone – set national unbundling rules. See *United States Telephone Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) ("*USTA II*"). In view of this reality, it is perhaps not surprising that, in its last ditch appeal to the Supreme Court, NARUC candidly admitted that absent reversal of *USTA II*'s construction of the Act, the unbundling game is largely over for the states. See NARUC Pet. at 22 (filed June 30, 2004) (Attach. E hereto).

2. The Act's So-Called "Savings Clauses" Expressly Forbid State Requirements That Interfere With The Full Accomplishment of Congress' Balanced National Scheme for Unbundling.

The CLECs' heavy reliance on the Act's savings clauses (see CLEC Br. 24-27) is misplaced. None of the provisions on which the CLECs rely undercuts in any way the breadth of federal preemption under the Act, as recognized by the Supreme Court in *AT&T Corp.* The Supreme Court consistently has warned against "plac[ing] more weight on the savings clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme." *United States v. Locke*, 529 U.S. 89, 105 (2000). A savings clause "does not bar the ordinary working of conflict pre-emption principles," and therefore courts must "decline[] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-70 (2000) (quoting *Locke*, 529 U.S. at 106). The Seventh Circuit, too, consistently

has rejected "interpretations of [savings clauses] that would empower state courts to gut the federal regulatory scheme." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998).

Contrary to the CLECs' suggestion, the so-called "savings" provisions in the 1996 Act are more accurately characterized as preemption clauses than as anti-preemption clauses. As both the Sixth and Seventh Circuits have held, the Act's savings clauses reflect Congress' "clearly stated" intent "to supersede state laws that are inconsistent with" the provisions of the Act and its implementing regulations. *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002); *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003); see also 47 U.S.C. §§ 251(d)(3), 252(c)(3), 261(b), 261(c); Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143 (1996).

Section 251(d)(3), for example, permits only state rules that are *both* "consistent with the requirements of this section" *and* "d[o] not substantially prevent implementation of the requirements of this section *and the purposes of this part*" (emphasis added). That provision provides no support for the CLECs' argument, for the FCC has held that section 251(d)(3) "essentially restates the principles that would apply under the Supreme Court's general preemption jurisprudence." Memorandum Opinion and Order, *Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 F.C.C.Rec. 3460, ¶ 51 (1997) (*"Texas Preemption Order"*), *aff'd sub nom. City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999). In addition, the FCC expressly rejected "AT&T's argument that the validity of state unbundling regulations under section 251(d)(3) must be measured solely against the Act's purposes," because that argument "fails to recognize that the [FCC] is charged with implementing the Act and its purposes are fully consistent with the Act's purposes." *TRO* ¶ 193 n.614. See, *e.g.*, *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the

purposes thereof"); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153-54 (1982) (holding that federal regulations have "no less preemptive effect" than direct statutory mandates from Congress).

The CLECs misleadingly suggest that under section 252(e)(3), any state unbundling order is fair game "so long as it does not invoke state law to create barriers to entry in violation of Section 253 [of the 1996 Act]." CLEC Br. 24. But the CLECs overlook the obvious fact that the authority of a state commission to establish or enforce "other requirements of State law *in its review of an agreement*" under section 252(e)(3) of the 1996 Act is cabined by the requirement in section 252(e)(6) that the resulting agreement must not be inconsistent with federal law. 47 U.S.C. §§ 252(e)(3), (6) (emphasis added). This proceeding, of course, is not a review of an agreement. Moreover, as with the Act's other savings clauses, section 252(e)(3) only authorizes state regulation that can be squared with the Act and the FCC's implementing regulations. Thus, not surprisingly, the FCC has concluded that under "the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 * * * state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not 'substantially prevent' its implementation." *TRO* ¶ 194.

The "general restraints on state actions found in sections 261(b) and (c)" (*TRO* ¶ 192) contain essentially the same limitations on state regulation as sections 251(d)(3) and 252(e)(6), and thus those sections also effectively codify federal preemption law. Section 261(b) permits the enforcement or enactment of state regulation "not inconsistent with the provisions of this part." Section 261(c) allows state regulation that is "*necessary* to further competition * * * as long as the State's requirements are *not inconsistent with this part or the Commission's regulations to implement this part*" (emphasis added). Of course, as the Supreme Court and the

D.C. Circuit have observed, one of the primary "purposes of this part" – Part II of the Act, which encompasses sections 251 through 261 – is the establishment of national unbundling standards by the FCC. The Commission's conclusion with respect to the unbundling of the so-called Broadband UNE is equally true with respect to the unbundling issues here: "the FCC has made clear that there is no room for the states to differ or act independently on the matters at hand" and any state obligation that deviates from the unbundling lines drawn by the FCC would "interfere with the federal regime." Sept. 28, 2004 Order on Reopening, Docket No. 00-0393, at 42.

Finally, the CLECs also invoke to no avail section 601(c) of the Act, an uncodified "savings clause" that provides that the Act "shall not be construed to modify, impair, or supersede" state law "unless expressly so provided." Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143. As noted above, throughout the Act's local competition provisions (sections 251 through 261), Congress repeatedly and *expressly* forbade the states from regulating in a manner that is inconsistent with the Act and the FCC's implementing regulations. *Wisconsin Bell*, 340 F.3d at 443; *Verizon North*, 309 F.3d at 940. And, in any event, section 601(c) adds nothing to the ordinary preemption principles that already are at issue in this case. See *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) (stating that "an express pre-emption provision" does not "bar[] the ordinary working of conflict pre-emption principles") (quoting *Geier*, 529 U.S. at 869).

3. There Is No Presumption Against Preemption Of State Unbundling Rules That Depart From The FCC's National Rules.

The CLECs also are flatly wrong in contending that a "particularly strong 'presumption' that Congress did not mean to oust state law" (CLEC Br. 22) applies to the 1996 Act. The Supreme Court rejected precisely that argument in *AT&T Corp*. See *AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 641 (5th Cir. 2001) ("the Court in [*AT&T*

Corp.], in answer to arguments of the dissenters relying on the presumption against preemption of state regulatory power, responded that the 1996 Act clearly manifested Congress's intent to supplant traditional state police power regulation of local telecommunications competition"). Justice Breyer, dissenting in part, cited some of the same cases on which the CLECs rely here in arguing that the Court should "interpret statutes of this kind on the assumption that Congress intended to preserve local authority." *AT&T Corp.*, 525 U.S. at 420 (Breyer, J., concurring in part and dissenting in part) (citing, *inter alia*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)). In response, Justice Scalia, writing for the majority, stated as follows:

> Justice BREYER appeals to our cases which say that there is a "presumption against the pre-emption of state police power regulations," * * * and that there must be "clear and manifest" showing of congressional intent to supplant traditional state police powers' * * *. But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. *With regard to the matters addressed by the 1996 Act, it unquestionably has*.

Id. at 378 n.6 (emphasis added). In other words, "[w]ith regard to the matters addressed by the 1996 Act" (*id*.), state law is preempted; "[i]nsofar as Congress has remained silent" (*id*. at 381 n.8), the states may continue to regulate – but only in a manner consistent with the Act (as the savings clauses expressly state).

Under the Supremacy Clause, states must respect purposive statutory compromises, such as those reflected in Congress' adoption of an "impairment" standard for unbundling. Where Congress has made a specific policy judgment as to how a law's objectives would best be promoted, state laws "that upset the careful balance struck by Congress * * * stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress" and are preempted. *Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982) (plurality opinion); see also *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 n.6 (1985) (noting that the National Labor Relations

Act "pre-empts state laws that 'upset the balance of power between labor and management expressed in our national labor policy'"); *Wisconsin Bell*, 340 F.3d at 445 ("to identify the policy underlying a statute and then run with it is a dangerous method of interpretation; it is likely to run roughshod over the compromise between interest groups that enabled the statute to be passed in the first place").

Here, in the specific context of unbundling rules, the clash between the state law unbundling requirement imposed in the Commission's prior Order and the "careful balance" struck by Congress and by the FCC with respect to the scope of incumbent carriers' unbundling obligations could hardly be clearer. Federal law imposes a "necessary and impair" test that must be applied before an incumbent carrier may be required to "unbundle" network elements for its competitors. 47 U.S.C. § 251(d)(2). That test creates a "limiting standard" on the unbundling obligation that reflects Congress' (and the FCC's) careful "balancing" of competing interests and its rejection of a "blanket" – or even a "more is better" – approach to an incumbent's duty to share its network. *AT&T Corp.*, 525 U.S. at 387-90 (majority opinion); *id.* at 429-30 (Breyer, J., concurring in relevant part); *USTA I*, 290 F.3d at 425-27. As the Supreme Court summarized, if "Congress had wanted to give blanket access to incumbents' networks," it "would simply have said * * * that whatever requested element can be provided must be provided." *AT&T Corp.*, 525 U.S. at 390. But that is not what Congress said. Instead, Congress required the FCC – and only the FCC (see *USTA II*, 359 F.3d at 565-66) – to establish nationwide rules that would recognize the need for balance.

The FCC's holding of non-impairment for enterprise switching illustrates the balance mandated by the 1996 Act. In the *TRO*, the FCC "establish[ed] a national finding that competitors are not impaired with respect to DS1 enterprise customers that are being served

using loops at the DS1 capacity and above." *TRO* ¶ 451; see also 47 C.F.R. § 51.319(d)(3). That finding reflects the FCC's judgment that "the revenue opportunities associated with serving DS1 enterprise customers generally are sufficient to justify the sunk and fixed costs associated with using and installing the switch," thereby allowing CLECs to deploy their own facilities; a judgment confirmed by extensive evidence showing "that competitive LECs are competing successfully in the provision of switched services * * * to medium and large enterprise customers without unbundled local circuit switching." *TRO* ¶¶ 452-453. The Commission's prior construction of section 13-801(d)(4) as relegating to the "scrap heap of time" the federal impairment standard – if reaffirmed as Staff and the CLECs request – would nullify the FCC's national rule for enterprise switching, for a "platform" covered by that interpretation clearly would include enterprise switching. Thus, notwithstanding the FCC's express finding that CLECs can and do compete by investing in their own facilities, CLECs could obtain unbundled access to the incumbent's network at state-subsidized rates – a result that discourages investment and facilities-based competition.

Because achieving (and maintaining) the appropriate balance is absolutely essential to promote the very purposes of the legislation, the FCC's unbundling rules necessarily establish lines – *i.e.*, set both a floor and a ceiling – from which states may not deviate. See *AT&T Corp.*, 525 U.S. at 379 n.6 (holding that states must "hew" to the lines drawn by Congress and the FCC). Indeed, they must draw lines in order to accomplish Congress' goals in the 1996 Act. As the courts consistently have held, under Congress' design for local telecommunications competition, more unbundling is *not* better. And the D.C. Circuit emphatically held that it is the FCC's task – and its alone – to strike just the right balance between too little unbundling (in which competition is harmed because competitors are unable to duplicate certain services or

facilities) and too much (in which competition is harmed because neither incumbents nor competitors have sufficient incentives to invest and innovate). See *USTA I*, 290 F.3d at 427. As the Commission recently recognized, it would undermine this crucial federal policy if state commissions could ignore the FCC's authoritative policy. Sept. 28, 2004 Order on Reopening, Docket No. 00-0393, at 42.

In sum, under general preemption jurisprudence, federal limits on unbundling "take[] on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," and render inconsistent (and thus preempted even under the CLECs' analysis) any state attempt to impose such a requirement. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); see also *Geier*, 529 U.S. at 881 (explaining that where Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives); *Locke*, 529 U.S. at 115 ("'state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go'"); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (explaining that a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]"). And that is particularly true where, as here, the plain terms of the statute in question expressly prohibit inconsistent state laws. *Wisconsin Bell*, 340 F.3d at 443 (citing, *inter alia*, 47 U.S.C. § 261(b)).[2]

[2] Contrary to the CLECs' contention, the 1996 Act is completely different from federal environmental laws, for example, that establish minimum federal standards for regulating the treatment, storage, and disposal of waste, while expressly providing that nothing under federal law "'shall be construed to prohibit any State * * * from imposing any requirements, including those for site selection, which are more stringent than those imposed by [federal] regulations.'" *Old Bridge Chems. Inc. v. New Jersey Dep't of Envtl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992) (quoting 42 U.S.C. § 6929). The other cases on which the CLECs rely similarly are inapposite. *See, e.g., United States v. Akzo Coatings of Am.*, (cont'd)

4. The Seventh Circuit Has Held That It Cannot "Imagine" How A State Unbundling Decision That Deviates From A Federal Rule Could Survive A Preemption Challenge.

The CLECs also cite the Seventh Circuit's decision in *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378 (7th Cir. 2004), as if that decision supports a broad conception of the Commission's authority to impose state law unbundling requirements that deviate from federal unbundling standards. CLEC Br. 23, 27. But that decision actually supports SBC Illinois' position with regard to the unbundling issues raised in this proceeding.

To begin with, in *McCarty*, the Seventh Circuit reinforced SBC Illinois' view that the Act "preserves state authority to continue to regulate locally, *as long as the regulations promote, and do not conflict with, the stated goals and requirements of the Act on its face* ***or as interpreted by the FCC***." *Id*. at 392 (emphasis added). Moreover, the portion of the *McCarty* decision cited by the CLECs (see 362 F.3d at 391-93) did not even relate to the unbundling requirements established by section 251(c)(3) of the federal Act. Rather, it simply examined the states' residual authority under the Act's savings clauses in the very different context of the Act's interconnection quality provision set forth in section 251(c)(2)(C). The Act's interconnection quality provision states that the quality provided by the incumbent must be "at least equal" in quality to that enjoyed by the incumbent itself, a phrase that the court construed to "indicate[] that something more than equal is allowable" by its very terms. *Id*. at 393. The Seventh Circuit construed that provision to give the states leeway that the Act's impairment standard and

(… cont'd)

949 F.2d 1409, 1454, 1455 (6th Cir. 1991) (recognizing the obvious fact that, because the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") expressly provides that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within the state," 42 U.S.C. § 9614(a), CERCLA "sets only a floor").

unbundling provisions (by their plain language and as construed by the D.C. Circuit, acting as a Hobbs Act court) cannot be read to confer.

To the contrary, as both the FCC and the Seventh Circuit have recognized, with respect to unbundling, state commission unbundling orders that deviate from the FCC's rules almost invariably will be preempted. The Seventh Circuit made clear that with respect to the issues in this proceeding – access to UNEs – the states may not redraw the impairment lines drawn by the FCC. *Id*. at 394-95. Indeed, the court stated that it "cannot now imagine" how a state could craft an unbundling requirement that deviates from the FCC's unbundling determinations yet "will comply with the [1996] Act." *Id*. at 395 (quoting *TRO* ¶ 195). Thus, with respect to access to network elements, *McCarty* squarely supports SBC Illinois' position.

B. The Commission Should Reject Staff's Attempt To Use Pricing As A Means To Evade Federal Law.

Unlike the CLECs, Staff correctly recognizes the conflict between state-law unbundling and the impairment standard of federal law. In Staff's euphemistic terms, "the net effect of the [*TRO*] and the *USTA II* decision is to render the Commission's Section 13-801 Order at some degree of variance with existing federal requirements," and the initial Order is "arguably inconsistent with the federal scheme" and "may prove difficult to reconcile with federal law." Staff Br. 4, 38, 41. But Staff improperly suggests (at 27) that the Commission might be able to avoid the conflict by ordering state-law unbundling at a price based on some undefined "cost" standard rather than at the federal "TELRIC" price. Staff's theory has no support in federal *or* state law.

1. Staff's Theory Finds No Support From Section 13-801.

In the first place, Staff's approach is not the one the legislature chose. Staff's theory is founded on the premise that the General Assembly thumbed its nose at Congress on the

fundamental question of *which* network elements are to be unbundled, but then tried to repair the damage by choosing a different *price*. But Staff offers no citation to the statutory language or even any legislative history to support its "two wrongs make a right" theory. To the contrary, section 13-801 *tracks* federal law on the scope of unbundling (Section II.A *infra*). Likewise, instead of departing from federal law on price, the statutory pricing provision *mirrors* section 251 of the federal Act. Section 13-801(g) says that unbundled access is to be provided "at cost based rates" – tracking section 251(d)(1)'s federal mandate that the price for unbundled access "shall be * * * based on the cost * * * of providing the * * * network element."

The General Assembly did not enact the contortions that Staff posits now. If it had, the Commission would have developed a pricing methodology (and established prices) long ago. Yet even though more than three years have passed since the enactment of section 13-801, no one even advanced the novel pricing construction Staff posits here (much less attempted to implement it) before the Commission reopened this proceeding.[3] The Commission's July 11, 2002 Order in this docket spends over 175 pages on section 13-801 without mentioning section 13-801(g)'s language on price. The legislature could not possibly have enacted Staff's fiction when it passed section 13-801 in 2001. Staff's theory rests on its reading of the *TRO* (an erroneous reading, as shown in the next section), which did not even exist until August *2003*. Simply put, Staff's pricing fiction is just that: a fiction that Staff created after the fact to paper over the conflict between state and federal law that the initial Order incorrectly went out of its way to create.

Rather than inventing a "solution" that the General Assembly did not adopt or even consider (and that fails to solve the conflict between state and federal law anyway, as shown

[3] Staff first surfaced its pricing theory in September 2004, as part of testimony it filed in the interconnection agreement arbitration between SBC Illinois and MCI (Docket No. 04-0469).

below), the Commission should instead adopt the construction that is apparent from the statute itself and that is compelled by the rules of construction. Instead of deviating from federal law on the question of which network elements are to be unbundled and then deviating again on the question of price, the legislature *tracked* federal law on the scope of unbundling, thereby avoiding any conflict on price.

2. Staff's Theory Does Not Resolve The Conflict Between State And Federal Law.

The second problem with Staff's post-hoc theory is that, after going to the trouble of creating a fiction the General Assembly did not adopt, Staff's theory still does not resolve the conflict between state and federal law that it purports to address. The federal "necessary" and "impair" requirements are not limited to TELRIC or even to price; rather, the plain text of the statute provides that those requirements are "access standards" to be used in determining "what network elements should be made available for purposes of subsection [251](c)(3)." 47 U.S.C. § 251(d)(2). Likewise, section 251(c)(3) does not merely govern price but "access," and the "terms and conditions" of that access. Price is just one component of access, albeit an important one. A change in price alone does not fix a deviation from the federal law on "access."

Moreover, TELRIC is not the "crucial and defining attribute of network elements provided pursuant to the requirements of section 251" of the federal Act, the way Staff portrays it (at 24). The 1996 Act (like section 13-801) does not refer to TELRIC, it refers to "cost." 47 U.S.C. § 252(d)(1). TELRIC is just *one* permissible approach to assessing "cost" under the federal Act, and even now the FCC is in the midst of rethinking that approach. Notice of Proposed Rulemaking, *In re Review of the Commission's Rules Regarding the Pricing of Unbundled Network* Elements, 18 F.C.C. Rcd. 18,945 (2003).

Staff's citation to section 271 of the 1996 Act provides no support for its pricing fiction. While the FCC has held that section 271 of the federal Act requires access at prices other than those established by TELRIC, that does not mean that this Commission could do the same under state law. Section 271 is a federal statute, authored by the same Congress that established the impairment standard and administered by the same federal agency that has authority to decide which network elements are to be unbundled. The pricing standards the FCC applies under section 271 are dictated by federal law, not state law. The constitutional considerations of preemption that must guide *this* Commission's interpretation of a state statute are not applicable to the FCC's interpretation of a *federal* statute. Similarly, the FCC's administration of section 271 does not implicate the concerns that led the D.C. Circuit to hold that state commissions could not exercise the FCC's task of determining which network elements are to be unbundled – namely, that state commissions might "not share the agency's national vision and perspective, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme" (*USTA II*, 359 F.3d at 565-66).

In addition, Staff is simply wrong when it contends (at 28) that "[t]here is no reason to believe that cost-based rates required by PUA section 13-801(g) would be inconsistent with the pricing standards of section 201 and 202 of the 1996 Act," which govern pricing under section 271. For starters, Staff cannot support such an assertion because the "cost-based rates" under section 13-801(g) have yet to be determined – indeed, even the principles that would *guide* that determination have yet to be decided or articulated. And no matter what principles or prices the Commission might develop in the future, a state-regulated rate cannot comply with the federal pricing standards of sections 201 and 202. To the contrary, the FCC has held that sections 201 and 202 require nothing more than that "the market price should prevail" – "*as opposed* to a

regulated rate" of the type that the Commission would impose under section 13-801. *UNE Remand Order* ¶ 473 (emphasis added).

And at bottom, it cannot be true that a mere difference in price would allow a state to eviscerate the federal "necessary" and "impair" requirements; otherwise, a state could order the same blanket unbundling regime that federal law has rejected by merely raising the price a smidgen above TELRIC. Plainly, such an approach would improperly elevate form over substance. Indeed, under Staff's approach the Commission apparently could consider cost methodologies, such as LRSIC, that might produce rates *lower* than those based on TELRIC. Such an approach would plainly violate federal law.

C. Staff's and the CLECs' Contention that the Rules Established in the FCC's *TRO* Do Not Have Preemptive Effect Is Without Merit.

Both the CLECs (at 18-19) and Staff (at 20) contend that the *TRO* "has no preemptive effect" unless and until "SBC files a preemption claim with the FCC and the FCC enters an order." That argument rests on a deeply flawed reading of the D.C. Circuit's decision in *USTA II* and another fundamental misunderstanding of federal preemption law. Although the FCC did not address any specific state unbundling rule when it promulgated new national unbundling standards in the *TRO*, its rules are entitled to preemptive effect vis-à-vis any conflicting state-imposed unbundling requirement by operation of law under the Supremacy Clause. Because the *TRO* was before the D.C. Circuit on petitions for direct review under the Hobbs Act (28 U.S.C. § 2342(1)), the court could not opine on any issues that the FCC did not reach. Thus, the court held that the question whether any particular state unbundling rule is preempted by the *TRO* was not ripe for decision.

However, nothing in the *USTA II* decision or the *Triennial Review Order* even suggests – much less holds – that the FCC's new unbundling rules are entitled to less preemptive effect than

any other FCC rules. Indeed, any such suggestion would overrule, *sub silentio*, decades of Supreme Court precedent on the preemptive force of federal agency rules and regulations and would be contrary to the Supreme Court's own admonitions in *AT&T Corp.*, 525 U.S. at 379 n.6, about the respective roles of the state commissions, the FCC, and the courts under the federal Telecommunications Act of 1996 ("1996 Act" or "Act") – something that the D.C. Circuit neither intended nor had the power to accomplish in ruling that the states' anti-preemption arguments were not properly before it in *USTA II*. It is beyond dispute that "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988); see also *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes").

Staff's and the CLECs' argument reads far too much into the D.C. Circuit's statement that the FCC "has not taken any view on any attempted state unbundling order." *USTA II*, 359 F.3d at 594. In context, that statement simply reflects the fact that the FCC did not undertake to determine whether any *specific* unbundling rule established by any of the 50 states through its state commissions conflicted with, and thus was preempted by, the FCC's new rules. Rather than attempting to review individual state decisions in the context of its general rulemaking, the FCC directed all state commissions "to amend their rules and to alter their decisions to conform to" the new national unbundling rules promulgated by the FCC pursuant to the authority delegated to it by Congress in section 251(d)(2) of the 1996 Act. *TRO* ¶ 195. That is precisely what the Commission told the federal court it intended to do in this remand proceeding, and the Commission therefore should reject out of hand Staff's puzzling suggestion that the very rules to which the Commission's decisions must conform have no effect.

Finally, as the Commission already recognized in its recent Order on Reopening in No. 00-0393, the FCC's observation that it would entertain petitions seeking a declaratory ruling on preemption questions "is but an alternative route or vehicle that need not be employed." Sept. 28, 2004 Order on Reopening, Docket No. 00-0393, at 43. Rather, where "[t]he Commission has itself requested a remand from the district court to reconsider the relevancy of its existing orders," it "need not wait for the FCC or the courts to take preemptive action if they will." *Id*. That rationale applies equally to this matter and disposes of Staff's and the CLECs' ploy to avoid the clear import of the FCC's *TRO* rules. In this proceeding, the Commission should recognize the myriad issues as to which the conflict between its prior Order and binding federal law gives rise to serious constitutional questions under the Supremacy Clause. And the Commission further should do its level best to construe section 13-801 in a manner that avoids any need for the courts to decide those questions. In the next section, SBC Illinois reiterates its proposed construction that, if adopted by the Commission, would do just that.

II. SBC ILLINOIS' PROPOSED CONSTRUCTION IS FAITHFUL TO THE TEXT AND STRUCTURE OF SECTION 13-801 AS A WHOLE AND AVOIDS THE CONSTITUTIONAL ISSUES ARISING OUT OF THE COMMISSION'S PRIOR ORDER.

A. Section 13-801(d) Should Be Construed Consistently With Federal Law To Require SBC Illinois Only To Provide Access To UNEs And UNE Combinations.

As explained in SBC Illinois' Initial Comments, the Commission's prior construction of section 13-801(d)(4) is neither the only nor the most sensible reading of the relevant statutory text. The prior construction both disregards the Commission's obligation to read related sections of a statute as a whole and in context and flagrantly violates the rule that constitutional questions are to be avoided if at all possible. See, *e.g.*, *Sulser v. Country Mut. Ins. Co.*, 147 Ill. 2d 548, 555 (1992) ("sections of the same statute should be considered to be *in pari materia*, and that each

section should be construed with every other part or section so as to produce a harmonious whole"); *People v. Williams*, 119 Ill. 2d 24, 27 (1987) (holding that courts are obliged to avoid constructions of a statute that "would raise a substantial question as to its constitutionality").

SBC Illinois' proposed construction is faithful to both of those rules of construction. It is beyond dispute that sections 13-801(d)(1)-(3) track almost verbatim the federal rules regarding UNEs and UNE combinations.

FCC Rule 315	Section 13-801(d)
(a): "An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service." 47 C.F.R. 51.315(a)	(d)(1): "An incumbent local exchange carrier shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine those network elements to provide a telecommunications service."
(b): "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. 51.315(b)	(d)(2): "An incumbent local exchange carrier shall not separate network elements that are currently combined, except at the explicit direction of the requesting carrier."
(c): "Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network [subject to certain conditions]." 47 C.F.R. 51.315(c)	(d)(3): "Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself."

As the Commission recognized in its prior Order, sections 13-801(d)(1)-(3) limit an incumbent carrier's sharing obligations to "unbundled" network elements. Notably, the FCC has never interpreted its almost identical rules to require incumbent carriers to provide existing combinations that include network elements that are not required to be unbundled. And, contrary

to Staff's and the CLECs' contentions, the omission of the term "unbundled" from section 13-801(d)(2) does not undermine SBC Illinois' sensible, holistic construction. Because section 13-801(d)(2) simply forbids an incumbent carrier from separating elements that it has a duty to combine, the outer bounds of the obligation imposed by that provision are established by the incumbent's duties in sections 13-801(d)(1) and (d)(3) to provide and to combine only *unbundled* network elements. This interpretation of section 13-801(d)(2) is supported by the fact that the almost identically worded FCC Rule 51.315(b) – which also does not contain the word "unbundled" – has never been construed to allow CLECs access to existing combinations of network elements that do not consist entirely of unbundled network elements. And the absence of the term "unbundled" from section 13-801(d)(4) similarly should not be read as an expression of the General Assembly's intent to create an internal inconsistency in an otherwise coherent (and constitutional) regime for ensuring access to an incumbent carrier's network.

As SBC Illinois previously has explained, sections 13-801(d)(1)-(3) cover the combinations of unbundled network elements that SBC is required to provide. Section 13-801(d)(4) then addresses the *use* (not the scope) of a particular category of UNE combinations – the end-to-end "platform." Because the General Assembly defined such a "platform" to consist "solely of combined network elements," it should be read as being coextensive with the existing combinations that an incumbent carrier must provide and cannot separate pursuant to sections 13-801(d)(1)-(3). And because all combinations required under sections 13-801(d)(1)-(3) consist entirely of *unbundled* network elements, it was unnecessary – and even would have been redundant – for the General Assembly to have included the word "unbundled" as a modifier of "network elements platform" in section 13-801(d)(4).

Assuming for the sake of argument that the Commission's prior construction of section 13-801(d)(4) as imposing an obligation to provide access to certain "platform" combinations without regard to whether those combinations consist entirely of *unbundled* network elements (Order ¶ 77) was a *permissible* reading, it clearly was not the reading that best comports with the text and structure of the statute as a whole. In fact, the Commission's prior construction attributes to the General Assembly a desire to enact two contradictory provisions side-by-side in the same subsection of its 2001 telecommunications rewrite statute. According to the prior Order, in section 13-801(d)(3) the General Assembly required SBC Illinois to provide only combinations consisting entirely of *unbundled* network elements, but in section 13-801(d)(4) the General Assembly nullified that limitation with respect to the end-to-end "platforms" described in that section. It is elementary that statutes are to be read "to produce a harmonious whole" (*Sulser*, 147 Ill. 2d at 555), not an internally inconsistent collection of random legislative pronouncements. For that reason alone, the Commission's prior construction should be discarded. And if that were not enough, the Supremacy Clause issues raised by that construction provide the *coup de grace*.

Puzzlingly, both Staff and the CLECs assiduously avoid addressing SBC Illinois' statutory construction argument. Staff attempts to dismiss SBC Illinois' argument as an invocation of the "absurd result exception." Staff Br. 14. But it is no such thing. None of the cases cited in SBC Illinois' Initial Comments was decided on the basis of that exception. To the contrary, SBC Illinois' construction rests on an application of straightforward, run-of-the-mill construction principles that reflect both common sense and settled legal doctrine.

Moreover, Staff's own advocacy demonstrates that the language of section 13-801(d) is not as plain, and the meaning of that section is not as clear, as Staff would like the Commission

to believe. As noted above, the Commission's prior construction turned on the Commission's view that the presence of the word "unbundled" in subsections 13-801(d)(1) and (d)(3) – and the absence of that word in subsection 13-801(d)(4) – meant that the legislature incorporated the federal impairment standard in the former subsections but then nullified it in the latter one. Now, however, Staff asserts that "the use of the term 'unbundled network elements' in Section 13-801(d)(3) is * * * not dispositive." Staff Br. 37. By logical extension, Staff must also mean that the absence of that term in section 13-801(d)(4) likewise is "not dispositive" – and that the Commission's prior conclusion to the contrary did not "get it right" at all.

Staff's new theory is thus not a defense of the Commission's prior construction, but a dramatic departure that Staff inexplicably fails to acknowledge. The Commission found that the use of the term "unbundled network elements" in section 13-801(d)(3) *is* dispositive – not only in the initial Order here, but in its order in the arbitration between AT&T and SBC Illinois in Docket No. 03-0239. There, AT&T proposed to use the terms "network elements" and "unbundled network elements" interchangeably. Contrary to its present position here, Staff stated that the terms are *not* interchangeable. Following Staff's lead, the Commission rejected AT&T's proposal, stating that unbundled network elements are not the same as "network elements" but rather "comprise a subset of network elements." Aug. 24, 2003 Arbitration Decision, Docket No. 03-0239 at 41. The Commission explained that "UNEs are those network elements that the FCC or the Commission has ordered ILECs to 'unbundle' consistent with Section 251(c)(3) of TA96" – which in turn references the impairment standard of section 251(d)(2). The Commission stated that the distinction "is consistent with Section 13-801 of the Act." Yet now Staff acts as if the distinction that *Staff itself supported*, and that the Commission adopted, is "not dispositive" at all. At a minimum, the evolution of Staff's views on the

construction of section 13-801(d) demonstrates a lack of clarity in the statutory language – one which must be resolved in favor of federal law and not against it as Staff suggests.

Staff's new position on the construction of section 13-801(d) is also improper in view of its observation that the Commission's prior construction leads to a result that is "arguably inconsistent" with federal law in several respects. Staff is not helping the Commission to *avoid* or at least *minimize* such inconsistency – the duty the Commission undertook on remand – but to *expand* the conflict with federal law. Under Staff's new approach, the General Assembly not only nullified the federal impairment standard in section 13-801(d)(4) (and with respect to the "platform" combinations described in that subsection) but also in Subsections 13-801(d)(1)-(d)(3) (where the Commission previously found the word "unbundled" to incorporate rather than eviscerate the federal impairment standard). Thus, while Staff portrays its position as a mere defense of the status quo (an approach that would still amount to an abdication of this Commission's responsibility to *rethink* its initial Order), in reality Staff is proposing an *expansion* of the initial Order's error – an approach that would run directly counter to the Commission's task on remand. While the federal court did not anticipate a particular result in this remand proceeding, it is fair to say that the court expected all parties to make a serious effort to consider "a different conclusion that may resolve some or all of SBC's claims," (Attach. C at 1) and it most certainly did not expect the Commission to add *new* conflicts with federal law to those that already were present.

The Commission, too, has not been of one mind on the proper construction of section 13-801. Section 720.390 of the Commission's rules, titled "Access to Unbundled Network Elements," provides that an ILEC must offer (i) UNEs required by FCC rules, and (ii) other UNEs that the Commission determines must be unbundled "consistent with the Federal Act, the

Act and decisions of the federal courts and the FCC." In adopting this rule in Docket No. 99-0511, the Commission expressly stated that it "has endeavored to ensure that the new Part 790 is consistent with [Public Act] 02-0022," which includes section 13-801. Mar. 27, 2002 *Order*, Docket No. 99-0511, at 1, *modified in part*, *Second Notice Order* (Jan. 23, 2003). The Commission further held that "delineating specific UNEs involves a detailed process geared toward satisfying the requirements of TA96." *Id*. at 125. The inconsistency between the Commission's determination that impairment has been relegated "to the scrap heap of time" with respect to the end-to-end platform (Order ¶ 75) and its determination in the Part 790 rules that under state law access to network elements *is* governed by a finding of impairment as reflected in federal law further negates Staff's and the CLECs' contentions that the construction of section 13-801(d)(4) reflected in the Commission's prior Order in this docket is inevitable.

The CLECs heap colorful invective on SBC Illinois' arguments – calling those arguments "circuitous and confusing," "ill-founded," and even "disingenuous[]." See CLEC Br. 55, 61. But the CLECs' rhetoric is no substitute for analysis under the applicable principles of statutory construction. And on that score, the CLECs' only substantive response is that SBC Illinois' proposed construction would render section 13-801(d)(4) superfluous. *Id*. at 56. But that argument plainly is a nonstarter. SBC Illinois' construction gives coherence to section 13-801(d) as a whole and meaning to section 13-801(d)(4) in particular. As SBC Illinois explained in its Initial Comments, although section 13-801(d)(4) does not confer any additional substantive access rights on CLECs, it does specify the ways in which a CLEC "may *use* a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier." By its terms, section 13-801(d)(4) authorizes a CLEC to use such a platform "to provide end to end telecommunications service for the provision of existing and new local

exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or pay phone service providers without the requesting telecommunications carrier's provision or use of any other facilities or functionalities." 220 ILCS 5/13-801(d)(4). In other words, section 13-801(d)(4) spells out (i) what services a CLEC may provide using an end-to-end platform consisting of UNEs exclusively supplied by the incumbent LEC and (ii) what types of customers the CLEC may serve with such a platform.

Much of the CLECs' argument is not even based on the substantive provisions of sections 13-801(d)(1)-(d)(4). Rather, the CLECs cite prefatory language elsewhere in the statute to contend that the legislature intended to go beyond federal law *somewhere* in section 13-801, and that SBC Illinois' reading of sections 13-801(d)(1)-(4) would nullify section 13-801 in its entirety. But most of section 13-801 is not even at issue here. Much of section 13-801 does not even deal with unbundled access; even where it does, most of its provisions on unbundled access do not address (and are accordingly not affected by) the issue here: which network elements are to be unbundled. Instead, the bulk of section 13-801(d) deals with other issues, such as performance standards and intervals (see 220 ILCS 5/13-801(d)(5)-(6)) and the recovery of special construction costs (see 220 ILCS 5/13-801(d)(3)). The Commission need not decide today whether section 13-801's other provisions should be construed to go beyond federal law. The important point is that those provisions are not at issue here, and would accordingly not be nullified by the lawful and reasonable construction that section 13-801(d)(1)-(d)(4) does not require unbundling without regard to the federal impairment standard.

Moreover, the statute's prefatory language does not demonstrate that the legislature instructed the Commission to *eviscerate* federal law as the CLECs contend here. For starters, the

very first sentence of section 13-801(a) states the overriding principle that the statute be "not inconsistent" with the 1996 Act. Further, the oft-quoted statutory language regarding interconnection, collocation and unbundled access "to the fullest extent possible to implement the maximum development of competitive * * * offerings" did not instruct the Commission to depart from the law or to order that "whatever can be provided, must be provided" – particularly where (as here) the FCC has found no impairment. First, the Supreme Court squarely rejected the concept of blanket access two years before the statute was passed, and the legislature is presumed to know (and obey) the law. Thus, access to the "fullest extent possible" must be construed to mean unbundling to the fullest extent possible *under the law*. Second, giving CLECs unbundled access where the FCC has found there is no impairment does not further "the maximum development of competitive * * * offerings." Quite the contrary: almost by definition, a finding of non-impairment means that CLECs already have ample alternatives to the incumbents' facilities. Unbundled access in such situations *retards* the development of competitive service offerings, by discouraging innovation and investment, and by motivating CLECs to rely instead on the incumbents' facilities. Such unbundling only serves to "maximize" the profit margins of individual competitors, and the statute clearly does not instruct the Commission to do that.

The CLECs therefore clearly are wrong in suggesting that SBC Illinois' proposed construction renders section 13-801(d)(4), or section 13-801 as a whole, a nullity. The CLECs' only other argument – an argument that they advance repeatedly – is that the Commission should reject SBC Illinois' arguments because they are an "attempt to relitigate" the Commission's prior Order. That argument is baffling. In granting the Commission's remand motion, the federal court specifically observed that, in considering whether it can "resolve some or all of SBC

Illinois' claims in this case," the ICC "is empowered to (1) reconstrue the requirements of section 13-801, (2) revisit and resolve any ambiguities in statutory language, and (3) reconsider its application of the statute's requirements to the particular facts of this case." Minute Order in 02-C-6002, at 1 (N.D. Ill. May 17, 2004).

B. Statutory Interpretation Issues Related To Specific Network Elements Or Federal Requirements.

1. Enterprise Switching

With respect to "enterprise switching" (switching used to serve large "enterprise" customers such as those that use or could use higher-capacity telephone lines ("DS1" or above)), the FCC has established a national finding that competitors are not impaired with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above." *TRO* ¶ 451; see also 47 C.F.R. § 51.319(d)(3). The D.C. Circuit affirmed the FCC's finding of non-impairment for enterprise switching. *USTA II*, 359 F.3d at 586-87.

The CLECs do not separately address enterprise switching. Staff does not dispute SBC Illinois' analysis of federal law, but contends that section 13-801 "does not make any mention of business customers or business service, nor does it exempt ILECs from providing network elements to CLECs for the purpose of serving such customers." Staff's point, however, is irrelevant. The issue here is not whether section 13-801 expressly exempts or mentions enterprise switching, but whether the statute reflects federal law – which indisputably *does* contain such an "exemption." As shown in Section II.A above, section 13-801 tracks federal law and incorporates the federal impairment standard – thereby incorporating as well the undisputed federal holding that CLECs are not impaired without unbundled access to enterprise switching.

2. EELs Eligibility Criteria

In its prior Order, the Commission concluded that there is no collocation requirement in section 13-801 for the termination of EELs. Order ¶ 236. In the *TRO*, however, the FCC adopted "additional eligibility criteria" for access to high-capacity EELs and a series of "circuit specific architectural safeguards to prevent gaming." *TRO* ¶¶ 591, 597. Among other things, these reforms mandate that all EELs "must terminate into a collocation governed by section 251(c)(6) [of the 1996 Act] at an incumbent LEC central office within the same LATA as the customer premises." *TRO* ¶ 597.

Staff correctly "sees no reason why the Commission cannot reconsider [the initial Order] in a manner consistent with FCC rules, as SBC suggests" and accordingly recommends that the Commission "amend the Section 13-801 Order." Staff Br. 40. The CLECs stubbornly contend, however, that section 13-801 should be construed to nullify the federal collocation safeguard and *permit* the gaming the FCC sought to prevent. The CLECs are wrong on both state and federal law.

As to state law, Staff correctly acknowledges (at 39) that the initial Order "did not base its conclusions on the plain language of the statute" – in fact, the Order found that the statute did not address the collocation question one way or the other. Rather, the Order looked to *federal* law (namely, the FCC's definition of Unbundled Dedicated Transport), which at the time included "entrance facilities" leading from a central office to a CLEC network, thereby allowing an EEL to terminate somewhere other than a collocation arrangement. Order ¶ 236. Since then, however, the *TRO* adopted a new definition of the unbundled dedicated transport that "includes only * * * the transmission facilities between incumbent LEC switches" and thus "effectively eliminates 'entrance facilities' as UNEs." *TRO* ¶ 366 & n.1116. With the federal foundation of the initial Order thus removed, its unlawful conclusion should be removed as well.

Turning to federal law, the CLECs begin with a jaw-dropping misstatement. They contend (at 34) that the initial Order "is consistent with the Federal Act," because "[t]he FCC has previously stated that requiring collocation as a means of accessing network elements is contrary to the Federal Act." They cite the *UNE Remand Order* – without pointing out that the *UNE Remand Order* was itself remanded to the FCC and replaced with the *TRO*, which requires collocation for EELs. The CLECs cannot have forgotten that the Commission's task here is to reconsider its initial Order in light of developments in federal law – including the *TRO* – not to recycle obsolete citations to since-revised federal law.

The CLECs also miss the boat when they contend that a CLEC can satisfy the collocation requirement by "reverse collocation" or "indirect collocation" (*i.e.* the use of a third party's collocation arrangement). The point here is that federal law requires collocation in *some* form, be it traditional, reverse, or indirect. The initial Order did not require collocation in *any* form, and is accordingly inconsistent with federal law.

3. Limitations On Duty To Combine

There is and can be no dispute that FCC Rule 315(c), which addresses the incumbent's duty to combine those network elements that the incumbent is required to unbundle, incorporates the limitations recognized by the Supreme Court in *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002) ("*Verizon*").[4] The CLECs reflexively contend that section 13-801(d) was intended to be more stringent than the FCC rule, but that argument cannot bear a reading of the statute. Section 13-801(d)(3) is *less* stringent than FCC Rule 315(c). Section 13-801(d)(3) requires only that an incumbent LEC combine "any sequence of unbundled network elements

[4] Over and above the requirements of technical feasibility and nondiscrimination that appeared in the text of the rule, the Supreme Court and the FCC recognized that: (1) the incumbent LEC's duty to combine only arises when the new entrant is "unable to do the job itself"; (2) the incumbent only has to "perform the functions necessary to combine" and not necessarily complete the actual combination; and (3) the new entrant must pay "a reasonable cost based fee" for the incumbent's efforts. *Id*. at 535.

that it ordinarily combines for itself." The federal combinations rule extends to combinations of UNEs "even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination: (1) Is technically feasible; and (2) Would not undermine the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network." 47 C.F.R. § 51.315(c). The CLECs themselves concede the state-law point when they suggest that the Commission "might make express that the combinations requirements it is imposing are to be interpreted consistent with the FCC's unbundling rules and the FCC's *Local Competition Order*" (which is the order that the Supreme Court interpreted in *Verizon*).

The CLECs' citation to the AT&T/SBC Illinois arbitration decision is not "instructive." CLEC Br. 38. That decision is now before the federal courts, and the demise of its holding on combinations is foreordained by the Seventh Circuit's decision in *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 391 (7th Cir. 2004) ("*McCarty*"). There, the court held that a state commission combination requirement that did not contain the additional limitations recognized by the Supreme Court "is inconsistent with the Act as interpreted in *Verizon*, and should be remanded to the [state commission] for reconsideration."

That leaves the CLECs with the procedural argument that the Commission should simply ignore the Supreme Court's decision in *Verizon*, and the Seventh Circuit's decision in *McCarty*, because they were not part of the *TRO* or *USTA II*. SBC Illinois addresses that argument in Section IV.C. *infra*.

4. "Cap" On Number Of DS3 Loops Or Transport Facilities

The FCC's analysis of specific capacity levels also led it to "cap" the number of unbundled DS3 loops or transport facilities that a carrier could obtain: two DS3 loops per requesting carrier at any single customer location, and 12 unbundled DS3 transport circuits per

requesting carrier along any single route. 47 C.F.R. § 51.319(e)(2)(iii). The FCC explained that higher traffic levels would yield sufficient revenue for CLECs to deploy their own facilities. *TRO* ¶¶ 324, 388.

No party sought judicial review of either "cap" – not surprisingly, because AT&T is the party that proposed the caps in the first place, and they were based on evidence presented by CLECs. See CLEC Br. 32 n.14; *TRO* ¶¶ 324 n.954 & 388 n.1205. Yet the CLECs (aside from AT&T, which tries to sit this issue out) want the Commission to construe section 13-801 to overturn both federal caps. They contend (at 32) that "[n]o such restriction is found in Section 13-801." But the CLECs are reversing the rules of statutory construction. SBC Illinois need not show that section 13-801 separately adopts each and every individual federal decision on unbundling, network element by network element. Instead, the Commission has a *duty* to construe the statute to be consistent with federal law "wherever possible" – that is, so long as the statute does not unambiguously *preclude* such consistency. SBC Illinois has shown that the scope of unbundling under section 13-801 can reasonably (in fact, easily) be construed to be consistent with federal law, and that is sufficient to warrant a construction that section 13-801 follows the federal finding of non-impairment at the "caps" adopted by the FCC.

5. Splitters

A "splitter" is used to separate the high and low frequency portions of a loop. As SBC Illinois showed in its Initial Comments, the splitter is not an unbundled network element – or even a "network element" – under federal law. Indeed, the *TRO* has since held that incumbents need not provide unbundled access even to the high-frequency portion of the loop ("HFPL"). Staff agrees (at 44) that "the Commission should amend its Section 13-801 Order to relieve SBC of the obligation to provide splitters."

The CLECs, however, want the Commission to repeat the initial Order's mistake. Their construction of state law relies mainly on the generic argument that section 13-801 ties the Commission's hands and requires it to depart from federal law. SBC Illinois rebutted that contention in Section II.A *supra*. Here, SBC Illinois adds only that Staff does not agree with the CLECs and does not read section 13-801 to cover splitters.

The CLECs also err wildly in their view of federal law. For starters, there is no basis whatsoever for their contention that "SBC is required to provide access to * * * splitters under the Commission's orders in connection with * * * Section 271 of the [1996] Act." As the Commission is well aware, the FCC has repeatedly held that section 271 (like the rest of federal law) does *not* require an incumbent to provide splitters. *Texas 271 Order*, 15 F.C.C. Rcd. 18354 ¶¶ 327-28 (2000); May 1, 2001 Amendatory Order, Docket No. 00-0393, at 1 (collecting authorities). In its investigation under section 271, this Commission (in its capacity as an advisor to the FCC) agreed that "ILEC provisioning of a splitter is not a federal law requirement. Thus compliance does not need to be shown here." May 13, 2003 Order, Docket No. 01-0662, ¶ 1611. The CLECs' reference to the Commission's section 271 Order merely states that SBC Illinois "will provide CLECs with access to the end-to-end Broadband UNE that the Commission ordered in Docket No. 00-0393," but that provides no support for the CLECs' position here. To the contrary, in Docket No. 00-0393 the Commission stated that SBC Illinois "is not required to provide splitters under any circumstances and, therefore, cannot be required to provide them to CLECs utilizing the UNE-P." May 1, 2001 Amendatory Order, Docket No. 00-0393, at 1.

The CLECs also point out that the *TRO* established a transition mechanism for the HFPL, but that provides no support for their position here. Even when the FCC's rules called for unbundling of the HFPL, the FCC had held that incumbents could not be required to provide

splitters. The important – and undisputed – lesson to be drawn from the *TRO* is that the FCC found unbundling of the HFPL to "skew competitive LECs' incentives," "discourage innovative arrangements," and "run counter to the [1996 Act]'s express goal of encouraging competition and innovation" (*TRO* ¶ 261) thereby adding even more force to its already-established rules on splitters. True, the FCC established a transition plan to wean competitors from the unlawful HFPL rules, but even the transition plan does *not* require incumbents to provide splitters. Likewise, while the *TRO* still require incumbents to permit competitors to "split" the high and low frequency portions of a loop between themselves, it expressly states that the competing carrier is to "provide[] its own splitter." *TRO* ¶ 251.

6. Resale Of Shared Transport

Neither Staff nor the CLECs dispute that federal law does not allow a CLEC to resell the shared transport UNE to an intraLATA toll carrier.[5] They cite the initial Order for the proposition that section 13-801 does not expressly prohibit such resale, but that is not the point. Federal law already contains the governing preclusion. The question is *not* whether section 13-801 expressly adopted federal law (because the legislature is presumed to abide by governing law), but whether section 13-801 clearly sought to *overturn* federal law. Put another way, it does not matter if section 13-801 *could* be read to permit resale of shared transport in contravention of federal law; the Commission has a duty to avoid such a construction unless it is the *only* possible reading. And that is where Staff, the CLECs, and the initial Order all fail. Section 13-801(d)(4) expressly provides that the "platform" may be used by a carrier only to provide service "to its end users or pay phone telephone service providers" (220 ILCS 5/13-801(d)(4)) – not to other

[5] The CLECs contend that the Commission should ignore this aspect of federal law as beyond the scope of the remand, as it was not changed but instead confirmed by the *TRO*. SBC Illinois refutes the CLECs' procedural ploy at Section IV.C., *infra*.

carriers. It is at least reasonable to read that provision to preclude resale the same way that federal law does (indeed, SBC Illinois maintains that to be the *only* reasonable reading), and accordingly that is the reading the Commission must adopt.

7. Terminating Access For IntraLATA Toll

There is no dispute that under federal law, SBC Illinois cannot be required to provide unbundled access to the terminating switch as part of the platform when it terminates a toll call to an SBC Illinois end user – because the terminating switch port is not even a network element under federal law, much less an "unbundled" network element. Accordingly, federal law permits SBC Illinois to charge terminating access to that switch. Staff and the CLECs contend that section 13-801(d)(4) requires SBC Illinois to provide a "platform" of "network elements" without regard to whether those network elements are "unbundled" network elements under federal law. Over and above the fact that their construction of the statute is erroneous (as shown in Section II.A above) their argument is irrelevant, because the terminating switch is not even a "network element" in the first place. As SBC Illinois showed in its opening Comments, the switching network element must always include a "line port" that is attached to a line of a particular end-user customer. *TRO* ¶ 433; *First Report and Order*, ¶ 414. At a terminating switch, the competing carrier does not and cannot use the line port connected to the called party, because that port belongs exclusively to the carrier (SBC Illinois or another competing carrier) that serves that party. *Id*. (a line port is a "dedicated facilit[y]" that is allocated on a "per-line

basis" for use in providing service to the customer served by that port).[6] Neither Staff nor the CLECs dispute or even acknowledge this dispositive point.

III. THE ALTERNATIVE REGULATION STATUTE DOES NOT AUTHORIZE THE COMMISSION TO VIOLATE FEDERAL LAW OR TO INCORRECTLY CONSTRUE STATE LAW.

SBC Illinois has been subject to a plan of alternative regulation since 1994. The CLECs contend that SBC Illinois' agreement to alternative regulation licensed the Commission to impose unbundling obligations that conflict with federal law. If there was any provision of SBC Illinois' alternative regulation plan that actually reflected an "agreement" to unlawful unbundling obligations – or a "waiver" of SBC Illinois' rights to contend that such obligations were imposed under an incorrect interpretation of state statutes, and were contrary to federal law – the CLECs would have cited it. There is none. Of course not. SBC Illinois' 1994 alternative regulation plan predates the Commission's unlawful Order by eight years, the enactment of section 13-801 by seven years, and the 1996 federal Act by two years. SBC Illinois could not have agreed in 1994 to an erroneous interpretation of a statute that had not even been written, nor could it have waived rights under a federal law that had not even been enacted. The continuation of alternative regulation after 1994 (and after the enactment of section 13-801 and the Commission's initial Order in 2002) was not the product of an "agreement" at all; the Commission's 1994 order approving alternative regulation *requires* SBC Illinois to continue until the Commission approves a new plan.

What the CLECs are really saying, then, is that the mere *existence* of alternative regulation licenses the Commission to (i) invent new obligations outside of the alternative

[6] The FCC's conclusion applies with equal force under state law. Like federal law, section 13-216 defines a "network element" to be a "facility or equipment used in the provision of a telecommunications service."

regulation plan after the plan is adopted, and (ii) ignore the 1996 Act – a theory that would virtually nullify the 1996 Act, because virtually all large incumbent carriers in the nation are subject to alternative regulation. That is absurd. Nothing in SBC Illinois' alternative regulation plan, or the statute under which the plan was adopted, authorizes the Commission to either (i) depart from the principles of statutory construction, or ignore its obligation to construe statutes in accordance with federal law where possible, or (ii) violate federal law. After all, alternative regulation is a creature of state law, and *no* state law is superior to federal law.

While no legal precedent is necessary to confirm these self-evident principles, the Appellate Court of Illinois has provided one anyway. In *Illinois Bell Tel. Co. v. ICC*, Nos. 3-03-0207 & 3-03-0515, 2004 WL 2093617 (Ill. App. Sept. 17, 2004), the court considered whether a provision imposed by the Commission in its review of SBC Illinois alternative regulation plan – namely, the requirement that SBC Illinois tariff a "remedy plan" – was consistent with federal law. The court concluded that "this aspect of the Commission's order * * * subverted the negotiation and arbitration process required by section 252 of the Telecommunications Act of 1996 * * * and was therefore preempted by the federal act." The court reached that conclusion, and overturned the tariffing requirement, "despite the broad authority that the Commission had to include the Condition 30 remedy plan as a part of the modified Alt Reg Plan." As the court explained, "[n]othing in the [Public Utilities] Act, *even the independent authority for alternative regulation* found in section 13-506.1, gives the Commission the power to controvert federal law."

Finally, the CLECs' inapposite analogy to section 271 simply demonstrates why their theory on alternative regulation is wrong. In the first place, section 271 is a federal statute administered by the FCC, and does not implicate the constitutional considerations of preemption

that govern the construction of the state law at issue here. Moreover, even section 271 does not constitute a blank check to impose new obligations after the fact. Rather, the requirements of section 271 are spelled out by a statutory checklist and by the FCC rules and precedents in place at the time of a BOC's application. The FCC has repeatedly held that the purpose of a section 271 proceeding is to apply existing federal rules, not to create new rules or to litigate "new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors - disputes that [the FCC's] rules have not yet addressed and that do not involve per se violations of self-executing requirements of the Act." *Kansas & Oklahoma 271 Order*, 16 F.C.C. Rcd. 6237, ¶19 (2001). By contrast, the CLECs here are trying to use alternative regulation as a basis for imposing new obligations *after* the alternative regulation plan has been submitted, after the Commission's review of that plan was completed, and after SBC Illinois was legally bound to continue under the plan.

IV. CHANGES IN FEDERAL LAW

In its opening brief, SBC Illinois reviewed the *TRO* in detail and described the developments in, and current state of, federal unbundling law. Among other things, SBC Illinois showed that the FCC has held that incumbents cannot be required to unbundle enterprise market switching, entrance facilities, dedicated transport or enterprise market loops at capacities of "OCn" or above, "splitters" or the feeder portion of subloops. Further, SBC Illinois demonstrated that it need not provide access to its switch to terminate intraLATA toll calls, that it may charge terminating access rates to a CLEC that uses unbundled local switching and shared transport to deliver an intraLATA toll call from the CLEC's customer to an SBC Illinois customer, and that a CLEC is not permitted to resell UNEs. SBC Illinois also showed that:

(1) to the extent that unbundled DS3 loops or transport are to be provided, a requesting carrier may not obtain three or more unbundled DS3 loops at

any single customer location, and it may not obtain 12 or more DS3s' worth of dedicated capacity along any particular route;

(2) to the extent that high-capacity EELs are to be provided, they need be provided only where the requesting carrier satisfies the eligibility criteria specified in the *TRO* (and particularly, the obligation that EELs terminate in a collocation arrangement at an SBC Illinois central office); and

(3) to the extent unbundled transmission facilities are to be provided, SBC Illinois need only perform "routine network modifications" to facilities that have already been constructed, and need not construct transmission facilities or lay new fiber or cable.

Staff agrees that "SBC has generally provided the Commission with a fair recitation of the state of the law." Staff Br. 6. The CLECs object to SBC Illinois' discussion of federal law on entrance facilities and network modifications. Further, the CLECs try the procedural gimmick that the only "federal law" this Commission can consider is federal law that changed in *TRO* and *USTA II*. None of their objections has any merit.

A. Entrance Facilities

The CLECs' contention that this issue is "premature because the FCC has yet to issue a ruling" is flat-out wrong. The FCC did issue a ruling (in the *TRO*) and that rule states that SBC Illinois need not provide unbundled access to "entrance facilities" (transport facilities that connect a point on SBC Illinois' network to that of another carrier). See *TRO* ¶ 366 n.1116 (stating that FCC rule "effectively eliminates 'entrance facilities' as UNEs"). The CLECs point out that the D.C. Circuit remanded that determination to the FCC, and contend that there is a "possibility" that the FCC will "conduct an impairment analysis" for entrance facilities in its current rulemaking. But the CLECs are forgetting the dispositive point: While the D.C. Circuit remanded the FCC's decision on entrance facilities for further consideration, it did *not* vacate the FCC rule. The court noted that *part* of the FCC's reasoning was "superficially" inconsistent with the Act, in that the FCC had not adequately explained its conclusion that entrance facilities are

not "network elements" at all. *USTA II*, 359 F.3d at 596 (quoted at CLEC Br. 31). But the court did not disturb the FCC's end result that entrance facilities are not to be unbundled.

As the court recognized, even if the FCC were to find that entrance facilities are "network elements," that would only lead to an impairment analysis. *Id*. The outcome of that analysis is foreordained by the *TRO*, which held that entrance facilities are "the most competitive type of transport," and that "carriers are more likely to self-deploy these facilities because of the cost savings" they can achieve by aggregating traffic. *Id*. ¶ 367 & n.1122. Further, the FCC also found that its rule "is consistent with the Act because it encourages competing carriers to incorporate those costs within their control into their network deployment strategies rather than to rely exclusively on the incumbent LEC's network." *Id*. The D.C. Circuit did not disturb any of these FCC findings, and even noted that they provide "hints" as to the outcome of any impairment analysis. *USTA II*, 359 F.3d at 596. That is why the court left the FCC rule in effect. In essence, the CLECs are asking the Commission to vacate or stay the FCC rule – something that the D.C. Circuit refused to do, and that the Commission is not free to do.

B. Network Modifications

The CLECs concede that "SBC's summary of the *TRO* on this issue accurately quoted the FCC," but contend that "SBC only quoted the parts of the *TRO* it likes." CLEC Br. 49 (footnote omitted). According to the CLECs, "SBC omitted the key language" that defines routine network modifications as "those activities that incumbent LECs regularly undertake for their own customers." *Id*. at 49-50. It is the CLECs, however, that have engaged in omission. The very first words on this issue in SBC Illinois' Initial Comments quite clearly acknowledged and quoted the very language that the CLECs claim to have been omitted. To reiterate (SBC Br. 29):

> Where an incumbent LEC is required to unbundle its transmission facilities, the TRO requires it "to make routine network modifications to unbundled

> transmission facilities used by requesting carriers where the requested transmission facility has already been constructed." TRO ¶ 632. "Routine" modifications are defined as "those activities that incumbent LECs regularly undertake for their own customers" * * * *.

Nor do the CLECs dispute the other side of the coin: that routine network modifications do *not* include "the construction of new wires (*i.e.*, installation of new aerial or buried cable)" or that incumbent LECs need not "construct transmission facilities so that requesting carriers can access them as UNEs at cost-based rates." *TRO* ¶¶ 632, 645. Further, neither Staff nor the CLECs contend that anything in section 13-801 prevents the Commission from following federal law, or oppose the relief SBC Illinois has requested. The Commission should accordingly resolve this issue in SBC Illinois' favor.

C. The Commission Should Construe Section 13-801 In Light Of All Developments In Federal Law, Not Just Those Aspects That Were Changed In The *Triennial Review Order*

Even though the purpose of this remand is to consider federal law – and to carry out the Commission's obligation to conform to federal law – the CLECs contend that the Commission should ignore any aspect of federal law that was not changed by the *TRO* or *USTA II*. In other words, the CLECs claim that if the initial Order *already* conflicted with federal law *before* the *TRO* and *USTA II* (or if a conflict became clear based on developments in federal law other than the *TRO* and *USTA II*), the Commission should close its eyes. According to the CLECs, the Commission would go beyond the scope of the remand and reopening unless it blinds itself to federal law other than the *TRO* and *USTA II*.

The CLECs are ignoring history. The Commission did not ask for a partial remand of the federal case, nor did it ask to limit the remand to the *TRO* while leaving other issues before the Court. Rather, the Commission asked for and received a remand of the *entire* case, and to make

the broad scope of remand crystal clear the Commission expressly represented that the remand could affect "some *or all* of SBC's claims."

The CLECs are also ignoring the broad scope of the *TRO*. True, the *TRO* contained numerous important developments with regard to the scope of unbundling. But the *TRO* more broadly addressed the scope of federal preemption, and directed state commissions to reconsider their previous decisions on unbundling to conform to federal law. Indeed, the *TRO*'s discussion on preemption was the portion on which the Commission based its request for remand. Plainly, the FCC did not mean that state commissions were to consider only the new *TRO* rules and ignore the remainder of federal law.

V. THE COMMISSION ALSO MUST REVISE ITS PRIOR ORDER TO REFLECT AN INTERPRETATION OF SECTION 13-801 THAT COMPORTS WITH FEDERAL LAW REGARDING COLLOCATION.

SBC Illinois demonstrated in its Initial Comments that the D.C. Circuit has authoritatively construed the "necessary" standard established in section 251(c)(6) of the 1996 Act as a limitation on incumbent carriers' duties to permit collocation of CLEC equipment on the incumbents' premises. As the D.C. Circuit explained, that limitation reflects Congress' purposive balancing of its dual interests in (i) promoting competition and (ii) preserving private property rights that are infringed by the physical occupation of the incumbent's facilities (and thus avoiding constitutional infirmity under the Takings Clause of the Constitution). *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423-24 (D.C. Cir. 2000). The FCC subsequently has reached the same conclusion in its *Collocation Remand Order*[7] ¶¶ 20-21. In short, section 251(c)(6) reflects a Congressional determination that collocation is required only to the extent "'necessary for interconnection or access to unbundled network elements at the premises of the local exchange

[7] Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 2001 WL 893313, 16 F.C.C. Rcd. 15,435 (2001).

carrier,' *and nothing more*." *GTE Serv. Corp.*, 205 F.3d at 422-23 (emphasis added); see also *Collocation Remand Order* ¶ 21. As with unbundling, the Federal Act rejects – and emphatically so – any notion that more collocation necessarily is better. See *GTE Serv. Corp.*, 205 F.3d at 422-24.

There is no dispute that the Commission's prior Order construed section 13-801(c) to depart from federal law because the word "necessary" is absent from the statutory text. Order ¶ 41. So construed, section 13-801(c) runs afoul of both the Supremacy Clause and the Takings Clause of the federal Constitution. However, as SBC Illinois demonstrated in its Initial Comments, Illinois courts have not hesitated to imply a term (such as "necessary") into a statute where such a term would avoid rendering the statute invalid or unconstitutional. See, *e.g.*, *Trustees of Schools of Township 35 North v. Sons*, 27 Ill. 2d 63, 68 (1963); *In re Application of the County Treasurer*, 216 Ill. App. 3d 162, 169 (1st Dist. 1991); *Illinois v. Krueger*, 208 Ill. App. 3d 897, 904-05 (2d Dist. 1991).

Neither the CLECs nor Staff even addresses, much less distinguishes, SBC Illinois' cases, which provide ample authority for the Commission to adopt a constitutional construction of section 13-801(c). The CLECs' principal objection, again, is that the Commission previously rejected SBC Illinois' arguments. But the notion that the Commission simply should stick its head in the sand in the face of a remand from federal court to determine whether another round at the Commission would "resolve some or all of SBC's claims" (Minute Order at 1) must be rejected out of hand as a waste of time and resources.[8]

[8] Common sense dictates that if the federal court had not intended the Commission to take a fresh look at all of SBC's claims, it would have retained jurisdiction over those aspects of the case that were outside the scope of the remand instead of remanding the entire case.

The CLECs also incorrectly contend that SBC Illinois cannot demonstrate why the Commission's prior construction of section 13-801(c) "substantially prevents" implementation of the federal Act or is "inconsistent" with federal law. CLEC Br. 53-54. The D.C. Circuit and the FCC could not have been clearer that the "necessary" standard is not a "minimum federal obligation," but rather a firm line in the sand drawn by Congress to steer between its twin objectives of promoting sustainable competition and minimizing government-compelled infringement on private property rights. The Supreme Court has made crystal clear that where, as here, Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. *Geier*, 529 U.S. at 881. Because the Commission's prior construction of section 13-801(c) "upset the careful balance struck by Congress," it "stand[s] as [an] obstacle[] to the accomplishment and execution of the full purposes and objectives of Congress" and are preempted. *Edgar*, 457 U.S. at 634.

Staff does not dispute that state law as construed in the Commission's prior order conflicts with federal law. But Staff contends that the language of section 13-801(c) requires that result. The cases cited in SBC Illinois' Initial Comments – which, like the CLECs, Staff completely ignore – show otherwise. Where, as here, there is nothing even remotely approaching a clear statement by the General Assembly, the Commission should not presume from legislative silence (here, the omission of the word "necessary") that the General Assembly intended to disregard federal law. Instead, the Commission should (i) presume that the General Assembly intended to avoid conflict with federal law and (ii) reinterpret section 13-801(c) "to avoid rendering it unconstitutional." *Application of the County Treasurer*, 216 Ill. App. 3d at 169.

VI. THE COMMISSION ALSO MUST RECONSIDER ITS TARIFFING REQUIREMENT IN LIGHT OF FEDERAL LAW.

Finally, both Staff and the CLECs resist SBC Illinois' request to cancel its UNE tariffs. But Staff's and the CLECs' objections have no basis in either federal or state law. In fact, the relief that SBC Illinois seeks from the tariffing requirement imposed by the Commission's prior order is entirely consistent with federal law and with the Commission's own recent Order on Reopening in Docket No. 00-0393.

As SBC Illinois demonstrated in its Initial Comments (at 48-50), federal law prohibits state commissions from imposing access and interconnection obligations through state tariffs that operate outside of the section 252 process set forth in the 1996 Act. See, *e.g.*, *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497-98 (7th Cir. 2004); *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 442-45 (7th Cir. 2003). Accord *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 343 Ill. App. 3d 249, 258 (3d Dist. 2003). The Illinois Appellate Court has confirmed these holdings in the specific context of tariffing requirements imposed on carriers subject to alternative regulation. *Illinois Bell Tel. Co. v. ICC*, Nos. 3-03-0207 & 3-03-0515, 2004 WL 2093617 (Ill. App. Sept. 17, 2004) (holding that tariff "subverted the negotiation and arbitration process required by section 252 of the Telecommunications Act of 1996 * * * and was therefore preempted by the federal act" and overturning the tariffing requirement "despite the broad authority that the Commission had to include the Condition 30 remedy plan as a part of the modified Alt Reg Plan").

As the Commission itself has recognized, the "main thrust" of these cases is that the 1996 Act "provides the machinery for encouraging interconnection and that involves the negotiation of an interconnection agreement." Sept. 28, 2004 Order on Reopening, Docket 00-0393, at 55. The

Commission thus concluded that a tariffing requirement "would interfere with the procedures established by the Federal Act" and would be "unlikely to survive preemption." *Id*. at 56.

The Commission also noted that in light of the fact that, with respect to the transition period for the HFPL mandated by the *TRO*, SBC Illinois is bound by "FCC-mandated terms, conditions, and prices, unless SBC Illinois and requesting carriers voluntarily agree with each other to different terms," tariffing "is simply not necessary" as a practical matter. Sept. 28, 2004 Order on Reopening, Docket 00-0393, at 56. In light of the D.C. Circuit's holding in *USTA II* that the FCC – and only the FCC – can establish national unbundling rules, the same is true with respect to the elements of SBC Illinois' network at issue in this proceeding. Finally, the Commission also agreed with SBC Illinois – and rejected the identical arguments made by Staff (at 70-71) and the CLECs' (at 50) here – that, under the plain language of 220 ILCS 5/13-203 and the Appellate Court's decision in *Globalcom*, unbundled network elements (like the HFPL UNE) "are not a 'telecommunications service' as that term is used in Section 13-501 of the PUA" and thus there is "no need for tariffing" as a matter of state law. Sept. 28, 2004 Order on Reopening, Docket No. 00-0393, at 54. Accordingly, even if state law were not preempted by the 1996 Act, there would be no basis for imposing a tariff requirement in this proceeding.[9] See also *Illinois Bell*, 2004 WL 2093617, at *5 (tariffing requirement invalid "despite the broad authority that the Commission had to include the Condition 30 remedy plan as a part of the modified Alt Reg Plan" because "[n]othing in the [Public Utilities] Act, *even the independent*

[9] As in Docket No. 00-0393, Staff's characterization of SBC's tariff filing in this matter as "voluntary" is "not at all persuasive." Sept. 28, 2004 Order on Reopening, Docket No. 00-0393, at 55. SBC Illinois filed the tariff that implemented section 13-801 pursuant to the compulsion of the Commission's prior Order (see ¶¶ 609, 612).

authority for alternative regulation found in section 13-506.1, gives the Commission the power to controvert federal law").

In light of federal and state law, SBC Illinois respectfully submits that the Commission authorize SBC Illinois to withdraw its current UNE tariffs. See Order on Reopening in 00-0393, at 56 (granting that relief).[10] In the alternative, if the Commission does not allow SBC Illinois to cancel its UNE tariffs, then SBC Illinois requests that the Commission authorize SBC Illinois to amend its UNE tariffs as necessary to implement the changes in SBC Illinois' legal obligations resulting from the Commission's decision in this remand proceeding.

[10] The CLECs' argument that SBC Illinois should have attached "illustrative tariffs" to its comments makes no sense. After all, SBC Illinois' position is that the initial Order's tariffing requirement is unlawful, and that the existing tariffs should be eliminated. With respect to substantive obligations such as unbundling, SBC Illinois seeks a Commission declaration as to the scope of those obligations that can then be implemented in accordance with the 1996 Act. To that end, SBC Illinois' comments laid out at length and in detail the changes it proposes, and it is clear from the length of the CLECs' response that they had no difficulty understanding SBC Illinois' position.

CONCLUSION

For the reasons set forth above and in its Opening Comments, SBC Illinois respectfully requests that the Commission modify its initial Order and SBC Illinois' current wholesale obligations, as currently reflected in its tariffs, and issue a final order for this phase of the proceeding stating that:

(1) SBC Illinois need not provide unbundled access to "enterprise" switching or combinations that include "enterprise" switching, in light of the *TRO*'s holding that there is no impairment for enterprise switching.

(2) SBC Illinois need not provide unbundled access to shared transport, directory assistance, operator services, SS7 signaling, the 800 database, and the LIDB database unless (and only where) unbundled local switching is required.

(3) To the extent (if any) that unbundled local switching and shared transport are provided, SBC Illinois need not provide access to its switch to terminate intraLATA toll calls, and a CLEC is not permitted to resell UNEs. Further, SBC Illinois may charge terminating access rates to a CLEC that uses unbundled local switching and shared transport to terminate an intraLATA toll call.

(4) Local circuit switching, where it is to be unbundled, "includ[es] tandem switching" pursuant to 47 C.F.R. § 51.319(d)(1).

(5) To the extent that unbundled access of the constituent elements is required, SBC Illinois' duty to combine is limited to the situations specified in the applicable FCC rule and in *Verizon*.

(6) To the extent that unbundled transport is to be provided, such unbundling applies only to "the transmission facilities between incumbent LEC switches" and specifically excludes "transmission links that simply connect a competing carrier's network to the incumbent LEC's network" pursuant to paragraph 366 of the *TRO*.

(7) To the extent unbundled loops and transport are to be provided, unbundling does not apply to OCn level loops or transport, or to combinations including OCn level loops or transport, in light of the *TRO*'s holding that there is no impairment (and no unbundled access) for OC-n loops and transport.

(8) To the extent that unbundled DS3 loops or transport are to be provided, a requesting carrier may not obtain three or more unbundled DS3 loops at

any single customer location, and it may not obtain 12 or more DS3s' worth of dedicated capacity along any particular route.

(9) To the extent that high-capacity EELs are to be provided, they need be provided only where the requesting carrier satisfies the eligibility criteria specified in the *TRO* (and particularly, the obligation that EELs terminate in a collocation arrangement at an SBC Illinois central office).

(10) To the extent unbundled transmission facilities are to be provided, SBC Illinois need only perform "routine network modifications" to facilities that have already been constructed, and need not construct transmission facilities or lay new fiber or cable.

(11) SBC Illinois is not required to provide unbundled access to "splitters."

(12) SBC Illinois is not required to provide unbundled access to fiber feeder loop plant as a subloop UNE.

(13) SBC Illinois is required to permit collocation only of equipment that is "necessary" for interconnection or access to unbundled network elements.

(14) SBC Illinois need not file tariffs (and may remove existing Commission-ordered tariffs) that address unbundling or collocation.

Dated: September 7, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **SBC ILLINOIS' REPLY COMMENTS ON REMAND** was served on the following parties by U.S. Mail and/or electronic transmission on October 25, 2004.

_____

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